

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2143

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2143

MARIANO SALOMON,

Petitioner-Appellant,

v.

J. EDWIN LA VALLEE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT
MARIANO SALOMON

DAVID BLACKSTONE
401 Broadway
New York, New York 10013
Tel. 226-6684

Attorney for Petitioner-Appellant
Mariano Salomon

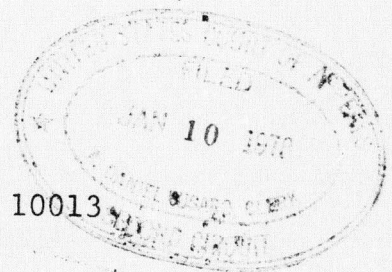


TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	3
PROCEEDINGS IN THE NEW YORK COUNTY SUPREME COURT...	3
The Trial.....	4
The People's Case.....	4
The Telephone Calls.....	5
The Stake Out.....	6
The Purchase of One Pound of Cocaine.....	7
The Arrests.....	8
Mr. Fusco's Trial Strategy.....	8
Cross Examination.....	9
Mr. Fusco's Waiver of an "Agent For Buyer" Claim for Salomon.....	10
Mr. Fusco's Summation.....	11
The Charge.....	11
The Sentence.....	11
PROCEEDINGS IN THE DISTRICT COURT ON THE HABEAS PETITION.....	12
The Waiver Hearing.....	13
ARGUMENT.....	17
MR. FUSCO'S "AGENT FOR BUYER" DEFENSE ON BEHALF OF THE CODEFENDANT VICTOR COLON CONFLICTED WITH HIS DEFENSE OF MARIANO SALOMON AND DEPRIVED SALOMON OF HIS SIXTH AMENDMENT RIGHT TO EFFEC- TIVE ASSISTANCE. MARIANO SALOMON DID NOT WAIVE HIS RIGHT TO CHALLENGE THE EFFECTIVENESS OF HIS ATTORNEY ON THAT BASIS.....	17

	Page
A. The Sixth Amendment Protects the Accused From Conflict in a Joint Representation.....	17
B. Colon's "Agent For Buyer" Defense Conflicted With Salomon's General Denial of Guilt. In- stead of Defense, Salomon Got Prosecution From Mr. Fusco.....	21
C. Mariano Salomon Did Not Waive His Right to Challenge the Effectiveness of Counsel.....	25
CONCLUSION.....	27

2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2143

MARIANO SALOMON,

Petitioner-Appellant,

v.

J. EDWIN LA VALLE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT
MARIANO SALOMON

Petitioner-appellant Mariano Salomon appeals from an order of the United States District Court for the Southern District of New York (Pollack, U.S.D.J.) denying his application for a writ of habeas corpus. In 1974 the petitioner-appellant was convicted after a jury trial in Supreme Court, New York County of criminal sale of a controlled substance in the first degree and criminal

possession of a controlled substance in the first degree. He was sentenced to a mandatory minimum term of 20 years and a maximum term of life on each count to run concurrently. The judgment of conviction was affirmed without opinion by the Appellate Division, First Department, *People v. Salomon* 377 N.Y.S.2d 347 (1st Dept. 1975) and leave to appeal to the Court of Appeals was denied. The petitioner-appellant then brought a pro se petition for habeas corpus under 28 U.S.C. § 2254 in the Southern District of New York, claiming, *inter alia*, that his Sixth Amendment right to effective counsel was violated because the same attorney represented both him and his codefendant, Victor Colon, at the joint trial.*

On July 20, 1976, Judge Pollack denied the writ in a written memorandum (Appendix, Exhibit B). The petitioner-appellant thereafter sought a certificate of probable cause in the Court of Appeals for the Second Circuit. On March 11, 1976, this court vacated the judgment of the District Court and remanded the case for consideration of the question of waiver. (Appendix, Exhibit C) After the remand, Judge Pollack held a hearing on waiver

*Victor Colon was also convicted of the same charges and was sentenced to concurrent terms of 15 years to life on each guilty count. The conviction was affirmed by the Appellate Division, First Department on March 16, 1976. Leave to appeal to the Court of Appeals was denied. Colon subsequently brought a petition for a writ of habeas corpus in the Southern District of New York, 76 Civ. 4401 (GLG), contending the same Sixth Amendment deprivation as is presented here. His case is being held in abeyance by the Honorable Gerald L. Goettel, pending a resolution of this appeal.

on June 2 and 3, 1977. On June 17, 1977, he dismissed the writ once again in a written memorandum (Appendix, Exhibit D). On November 9, 1977, this court granted a certificate of probable cause and assigned this attorney to the appeal.

ISSUE PRESENTED

Whether Mr. Fusco's "agent for buyer" defense on behalf of the codefendant Victor Colon conflicted with his defense of Mariano Salomon and deprived Salomon of his Sixth Amendment right to effective assistance. If so, whether Mariano Salomon waived his right to challenge the effectiveness of his attorney on this basis.

PROCEEDINGS IN THE NEW YORK COUNTY SUPREME COURT

Mariano Salomon and Victor Colon were charged in a New York County Indictment with criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first and third degrees. They both privately retained Otto Fusco, a very active Bronx criminal lawyer. On April 23, 1973, the case was brought for trial before the Honorable Mary Johnson Lowe in the Centralized Special Narcotics Part of the Supreme Court of New York County.

As soon as Salomon was produced he requested a two-week adjournment, contending that Mr. Fusco had only spoken to him for about five minutes in the bull

pen. [Tr. 6]* Judge Lowe responded that she was aware that Mr. Fusco's associate had been conferring with him. [Tr. 7] Salomon stated that he needed to confer directly with Mr. Fusco. [Tr. 7] Mr. Fusco stated that he had spent an entire hour with Salomon the previous Friday and that he had been well briefed by his associate on the case. [Tr. 7] A luncheon recess was declared to allow for further consultation. [Tr. 10] After the lunch period, Salomon stated that everything was satisfactory between him and his attorney. [Tr. 14] Jury selection then commenced without any inquiry being conducted by the court into the propriety of Mr. Fusco's joint representation.

THE TRIAL

THE PEOPLE'S CASE

Rocco Galasso, an undercover police officer with the Narcotics Division of the New York Police Department was introduced to Victor Colon on October 2, 1973, by an informant. [Tr. 239-240, 321] He began negotiating with Colon for the purchase of one pound of cocaine in November, 1973. All of the negotiations were conducted over the telephone and tape recorded. [People's Ex. 3-6, 10] Galasso initiated all of the telephone calls and placed them in the presence of other police officers from a telephone at the Drug Enforcement Task Force office.

*"Tr." citations are to the transcript of the trial. "H" citations are to the transcript of the waiver hearing held in the District Court.

Galasso reached Colon at the telephone number of the Hunts Point Paint and Hardware Store in the Bronx. [Tr. 242]

THE TELEPHONE CALLS

At 5:35 p.m. on November 5, 1973, Galasso made his first telephone call to Colon. Galasso asked for the price of one pound of cocaine. Colon quoted him \$3,000. Galasso agreed to the price and hung up. [Tr. 243] After doing so, it occurred to Galasso that a price of \$3,000 for a pound of cocaine was too far below the going rate to have been a correct quote. Consequently, Galasso immediately called Colon back to tell him that his quote must have been an error. Colon acknowledged as much and told Galasso that he would find out the correct price. [Tr. 245]

In the telephone call of November 6, 1973, Colon said that he had four ounces of cocaine available for \$3,000. Galasso said he still wanted a pound of cocaine and asked Colon once more to find out the price. The conversation ended with Galasso telling Colon that he would call again the following day. [Tr. 252]

At 2:45 p.m. on November 7, 1973, Galasso reached Colon again. Colon told Galasso that he still had not obtained a quote for a pound of cocaine and asked Galasso to call him later on in the day. [Tr. 256-257] Galasso was unsuccessful in reaching Colon in calls placed later that day.

At about 12:25 p.m. on November 8, 1973, Galasso reached Colon. Colon quoted Galasso \$12,000 for a pound of cocaine. Galasso said that he almost had the money together and would call him back within two and a half hours to say whether he would go through with the deal. [Tr. 264-265] At 3 p.m. Galasso reached Colon and told him that he had the money and would pick up the pound of cocaine at the Hunts Point Paint and Hardware Store at around 5 p.m. [Tr. 266]

THE STAKE OUT

Richard Farry, a police officer who served as the supervisor of the investigation, dispatched surveillance teams to the vicinity of the Hunts Point Paint and Hardware Store in the afternoon of November 8, 1973. Officer Farry and special agents Miller and Mulhern parked directly in front of the store in a Ford truck equipped with a one-way window. At 4:55 p.m. Farry observed the arrival of Galasso. Galasso double parked his car in front of the store and entered the store. [Tr. 76-77] At 7:25 p.m. Farry observed the arrival of Mariano Salomon. Salomon carried a dark paper bag with him and entered the store with it. [Tr. 474] Ten minutes after Salomon's arrival, Farry observed Colon and Galasso's departure from the store. Galasso carried with him a dark paper bag that looked like the same bag Salomon brought in. [Tr. 80]

THE PURCHASE OF ONE POUND OF COCAINE

Galasso obtained a \$12,000 "flash role" from the Task Force and went to the Hunts Point Paint and Hardware Store. He arrived at 4:55 p.m. and double parked his car in front of the store. [Tr. 271-272] Inside the store Galasso was greeted by Colon. Colon told him that the drugs had not as yet arrived and that he should wait. While waiting, Galasso observed routine business activity being carried on. On three separate occasions, however, he observed Colon speak in muffled tones on the telephone, and after each call, Colon reassured Galasso that the drugs were on their way. In fact, once Colon said, "Mario [is] on the way with the stuff." [Tr. 274]

At 6 p.m. the store closed for business, leaving Galasso, Colon, and an employee, Antonio Jimenez, within. [Tr. 276] At 7:25 p.m., Mariano Salomon knocked on the door and was admitted by Colon. Salomon entered the store carrying a black paper bag. [Tr. 279] After some general exchange of conversation, Salomon motioned for Colon and Galasso to follow him to the rear of the store where they would be away from Antonio Jimenez. In the back, Salomon placed the black bag on a box, stepped away and stated, "I have nothing to do with this deal. It's just [between] you and him." [Tr. 279] Galasso opened the bag. It contained two clear plastic bags

filled with white powder. Galasso said, "I am not even going to examine the bags... . I'll take your word for it." [Tr. 280] Salomon replied, "Well for all you know I could have put white powder in there. It may not even be coke." [Tr. 280] Galasso responded, "... I better check it" and began to do so. [Tr. 280] Colon obtained a scale from the front of the store which Galasso used to weigh the drugs. [Tr. 281] Galasso then returned the plastic bags into the black bag and invited Colon to go with him to his car for the money. [Tr. 282] Galasso and Colon then left the store. Galasso carried the drugs with him in the black paper bag.

THE ARRESTS

Colon was arrested by Galasso in Galasso's car a short time after they left the store. After Colon was placed under arrest, surveillance teams surrounded the store and after being refused admission, secured entry by smashing in the door with a garbage can. Salomon was found standing inside of the store and was arrested. [Tr. 276]

MR. FUSCO'S TRIAL STRATEGY

Mr. Fusco waived an opening statement. Neither defendant testified or offered evidence. On behalf of Victor Colon, Mr. Fusco raised the so-called "agent for

buyer" defense* and obtained for him only the standard instruction. Mr. Fusco endeavored to show that Colon did not know the first thing about the drug business and merely, as an accommodation to Galasso, served as an intermediary between Galasso and the true seller in a narcotics sale which was to be consummated at the Hunts Point Paint and Hardware Store.

In contrast to Colon's rigorous, though tenuous, defense, no specific defense was raised on behalf of Mariano Salomon. Mr. Fusco simply "winged it" and argued in vague terms for his acquittal. An analysis of the strategic developments follows.

CROSS EXAMINATION

Mr. Fusco brought out that in Colon's telephone conversations with Galasso he initially understated the price of a pound of cocaine by a gross amount and had to obtain the correct quote from the supplier; also, that Colon did not know the difference between a "kilo" and a pound; and that on the very day of the sale, Colon misquoted the price of a pound of cocaine once again - he said \$1,200 instead of \$12,000 - and had to be corrected by Galasso. The police were confronted with his naivete and asked to admit that Colon was, in Mr. Fusco's words,

*Under New York Law only a seller and those in business with the seller may be convicted of the sale and the possession charges that go with it. See, e.g., *People v. Lindsey*, 16 A.D. 2d 805, 228 N.Y.S.2d 427 (2nd Dept. 1962), affirmed, 12 N.Y.2d 958, 238 N.Y.S.2d 956 (1963); *People v. Hool*, 46 App. Div. 2d 912, 363 N.Y.S.2d 12 (2nd Dept. 1974). A participant in a drug transfer acting purely at the behest and accommodation of the buyer is therefore not guilty of the sale.

a "schmo" who did not know what he was doing. [Dunham: Tr. 213-216; Galasso: Tr. 326, 355, 357, 372] On behalf of Salomon, Mr. Fusco tested Officer Farry's observation of Salomon entering the store carrying a black paper bag. [Tr. 118-123] He also brought out that Salomon apparently did not break for the back door exit as the police were pounding to get in to arrest him through the front. [Tr. 420]

MR. FUSCO'S WAIVER OF AN "AGENT FOR
BUYER" CLAIM FOR SALOMON

Galasso's testimony was interrupted for argument heard outside of the jury's presence as to whether the people could prove Colon's prior narcotics transactions with Galasso in view of the assertion of an "agent for buyer" defense. In his argument against the introduction, Mr. Fusco first conceded the inapplicability of the "agent for buyer" defense as to Salomon and then argued that Colon's prior dealings would "prejudice" Salomon. [Tr. 515] Judge Lowe asked the Assistant District Attorney whether Salomon would be incriminated with the proof. The Assistant District Attorney advised that although he had a statement of Colon to the undercover agent implicating "Mario,"* the people would not offer it.

*MR. SCOTTO: Mr. Salomon was not involved in the transaction, Your Honor. In negotiating Your Honor that one occasion when Mr. Colon - excuse me Mr. Salomon did not appear with the merchandise, Mr. Colon did state to the Undercover that Mario wasn't there. He didn't know where he was and he was surprised that he hadn't come on time. That would be the only involvement of the defendant Mariano Salomon. [Tr. 517]

Judge Lowe said she would not restrict Mr. Fusco in his cross examination. Consequently, she would exclude the evidence of Colon's prior sales. [Tr. 518-520]

MR. FUSCO'S SUMMATION

In a highly evasive summation, Mr. Fusco argued the "agent for buyer" defense for Colon and contended that his client was a "schmo" for getting involved with the sale. [Tr. 615-617, 618, 620] Who then gave the cocaine to Galasso in the store Mr. Fusco did not explicitly say. However, Mr. Fusco did not accuse someone other than Salomon, such as the store employee Antonio Jiminez, of being the seller and did not explicitly deny that it was Salomon! Moreover, Mr. Fusco did not contest Galasso's varacity or claim a frame. Mr. Fusco hardly said anything at all about Salomon. At one point, however, he called for his acquittal because of Galasso's testimony that when Salomon entered the store with the cocaine and put it on a box he said "I have nothing to do with this deal." [Tr. 623]

THE CHARGE

A standard "agent for buyer" instruction was given and limited to Colon. A "knowing spectator" instruction was not requested by Mr. Fusco and the court did not charge it.

THE SENTENCE

Salomon and Colon were sentenced on June 11, 1974, still represented by Mr. Fusco.* Judge Lowe

*Mr. Fusco requested to be relieved on Salomon's other pending indictments and his application was granted.

sentenced Salomon to 20 years to life and Colon to 15 years to life. Salomon's greater culpability warranted the sentencing disparity in Judge Lowe's view. [Sen. 6, 8] Mr. Fusco did not dispute this evaluation.

PROCEEDINGS IN THE DISTRICT COURT ON
THE HABEAS PETITION

In his pro se habeas petition (Appendix, Exhibit E), Salomon argued that a conflict existed between him and Colon and that the joint representation prejudiced him at trial. He contended that Colon's "agent for buyer" defense in effect conceded the transaction at the Hunts Point Store and put the blame on him for the sale. The New York State Attorney General's affidavit in opposition (Appendix, Exhibit F) argued that Salomon was not entitled to an "agent for buyer" charge and that he was defended adequately.

On July 20, 1976, Judge Pollack dismissed the writ in a written memorandum (Appendix, Exhibit B). His opinion acknowledged that Colon's "agent for buyer" defense reflected adversely on Salomon's general denial of guilt. But he denied the writ anyway, reasoning:

While the inconsistency in the defense of the two defendants may have worked to petitioner's detriment, that possible prejudice did not arise because the defendants were jointly represented, but because they were joined as defendants in the same trial proceeding; there is no reason to believe that counsel for the codefendant would not have pressed the "buyer's agent" defense had each defendant been represented by his own attorney.

Moreover, petitioner makes no claim that he was dissuaded from testifying in his own defense because of the joint representation. See *United States v. Lovano*, 420 F2d 769, 774 (2nd Cir.), Cert. denied, 397 U.S. 1071 (1970). Thus, although prudence would have dictated individual representation in this case, petitioner has not shown any prejudice arising from its absence.

In response to Salomon's application for a certificate of probable cause, the Court of Appeals for the Second Circuit vacated the District Court order and remanded the case for "consideration of the question of waiver." (Appendix, Exhibit C)*

THE WAIVER HEARING

On June 2 and 3, 1977, Judge Pollack convened a hearing for consideration of the question of waiver. Salomon appeared and was represented by this C.J.A. attorney. Counsel for Salomon began by referring the court to the official stenographer's minutes of the proceedings before Judge Lowe, showing no allocution of any kind by the trial judge into the question of potential conflict and no discussion of the matter by the prosecutor, the defense attorney, or either defendant. [H. 2-5]

Mariano Salomon was then called to the stand by his counsel. Mariano Salomon testified that no judge in any pre trial appearance on his case inquired into the matter of conflict. [H. 11-12] He also testified that

*Judge Pollack concluded on page 2 of his first memorandum that " .. the trial judge apparently made no inquiry concerning the potential conflict in interest, and petitioner did not expressly waive his right to challenge the effectiveness of counsel on that basis."

before trial he did not discuss the problems of potential conflict with Otto Fusco or Otto Fusco's partner and brother, Fernando Fusco, or the Fusco associate A. Matthew Broughton. [H. 10-11] During the trial Mr. Fusco told Salomon that he would obtain an "agent for buyer" charge for Colon and that this would help Salomon too. [H. 13-14] At the time, Salomon did not understand the meaning of the defense and consented.* [H. 15]

In the course of Salomon's testimony, Judge Pollack directed counsel to secure the presence of the Fuscos and Mr. Broughton. The Fusco brothers appeared on the following day and testified. Mr. Broughton did not appear and the hearing closed without him.

Fernando Fusco basically testified that he had little to do with the case. In his opinion there was no conflict between the two defendants. [H. 49] On the few occasions that he appeared in court on the case no inquiry, to his recollection, was conducted by the court on the question of conflict. Moreover, the office file did not reflect that such a hearing transpired. [H. 53]

Otto Fusco, the trial lawyer, remained convinced that there was absolutely no conflict between the two defendants. [H. 60] He denied that there was any

*Apparently Judge Pollack himself misunderstood Colon's defense. The hearing record shows that he thought Colon claimed to have been Galasso's working informant. [H. 14, 39] Despite his own misunderstanding, Judge Pollack concluded that Salomon, who had a ninth grade level of education [H. 7], was "unworthy of belief" in his hearing testimony that at the time of the trial he did not understand the "agent for buyer" defense.

incongruity in arguing the "buyer's agent" defense for Colon while defending Salomon, the alleged seller, at the same time. [H. 69] He even denied that Colon's defense implied the occurrence of the sale.

BLACKSTONE: Can you tell me where Salomon is left at this trial when you are arguing to a jury and asking the judge to charge that the codefendant Colon was actually working on this drug sale at the behest of the buyer, not the seller; where does that leave Salomon?

FUSCO: Did you hear the judge just read --

BLACKSTONE: I'm asking you, sir.

FUSCO: I'm going to explain it to you. Okay? If Salomon had been culpable he would have gone through the rear of this store. I have at no time admitted that Salomon here brought in any narcotics there or made any effort to make a sale to any undercover agent or anybody else. That is where it leaves Salomon. We never conceded that Salomon ever brought in any narcotics or made any sale.

BLACKSTONE: When you say never conceded, you never expressly conceded, so that isn't there an implication that if you argue that one individual that you represent is actually taking part in a negotiation for the sale of drugs, aren't you conceding that something having to do with the sale of drugs occurred?

FUSCO: I'm not conceding the fact, even though this person here might have been an agent for the undercover agent that anything that developed out of it with the sale made by Salomon to anybody. You understand? Apparently we don't see eye to eye in that respect.

[H. 73-74]

* * * * *

In his second denial of the writ (Appendix Exhibit D), Judge Pollack abandoned his original position

that Colon's "agent for buyer" defense had worked to Salomon's detriment and adopted a new position that the two defenses were in harmony. In Judge Pollack's view, Mr. Fusco had actually raised the "innocent bystander" defense for Salomon. Since both defenses, "agent for buyer" and "innocent bystander," concede the illicit transaction, Salomon suffered no prejudice:

Otto Fusco, Esq., petitioner's experienced trial lawyer, testified that his theory of defense for the petitioner was that he was not a seller of drugs and indeed was not involved in the drug transaction in issue at all, but instead was a mere innocent bystander. He so summed up to the jury. Mr. Fusco's trial argument that the codefendant was an agent of the narcotics purchaser in no way implied that petitioner was the seller. While it may have amounted to a concession that some drug transaction did take place in which the codefendant was a participant, that was in no way inconsistent with nor prejudiced the defense that petitioner was merely an innocent bystander to whatever had occurred in respect of the codefendant.

(Appendix, Exhibit D,
p 2-3)

Inasmuch as there was no conflict, Judge Pollack saw no need to reach the question of waiver and declined to do so even though the case had been remanded for that purpose. (Appendix, Exhibit D, p 3)

ARGUMENT

MR. FUSCO'S "AGENT FOR BUYER" DEFENSE ON BEHALF OF THE CODEFENDANT VICTOR COLON CONFLICTED WITH HIS DEFENSE OF MARIANO SALOMON AND DEPRIVED SALOMON OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE. MARIANO SALOMON DID NOT WAIVE HIS RIGHT TO CHALLENGE THE EFFECTIVENESS OF HIS ATTORNEY ON THAT BASIS.

A. The Sixth Amendment Protects the Accused From Conflict in a Joint Representation.

Whenever a lawyer represents two or more defendants in a criminal prosecution there is inherent danger that counsel will not be able to give each client the attention and loyalty required for an effective defense. *Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942). If a conflict of interest or prejudice results from joint representation of codefendants by one attorney, the Sixth Amendment right to "untrammelled" assistance of counsel is abridged. *Glasser v. United States*, *supra*, 315 U.S. at 70; *United States v. De Berry*, 487 F2d 448 (2nd Cir. 1973); *United States v. Carrigan*, 543 F2d 1053 (2nd Cir. 1976). A challenge to the effectiveness of counsel on this basis may be made whether counsel is retained, *United States v. De Berry*, *supra*, or assigned, *Morgan v. United States*, 396 F2d 110 (2nd Cir. 1968)

Before trial a defense attorney can rarely be certain that no conflict will arise in a joint representation. *United States v. Carrigan*, *supra* (concurring opinion)

of Circuit Judge Lumbard at 1058) Conflict may spring unexpectedly from surprise evidence or from information belatedly revealed by a client. Consequently, most criminal lawyers in New York City behave sensibly and take a hard line against involvement with a joint representation.* This prudent approach is probably a professional responsibility.** At least two judges of this circuit would forbid multiple representation because of the conflict peril. *United States v. Mari*, 526 F2d 117 (2nd Cir. 1975) (concurring opinion of Circuit Judge Oakes); *United States v. Carrigan*, *supra*, (concurring opinion of Circuit Judge Lumbard)

*The writer understands that the Legal Aid Society will not represent codefendants and that Federal and State indigent panel members are never assigned to more than a single defendant.

**The Code of Professional Responsibility was promulgated by the American Bar Association in August, 1969 and adopted by the New York State Bar Association in January, 1970. See, Judiciary Law, Appendix. Ethical Consideration 5-15 reads:

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from the employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients."

Attorneys who ignore the many caveats against multiple representation, pass the problem along to the trial judge, "upon [whom] rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser v. United States*, *supra*, 315 U.S. at 71. Therefore, whenever codefendants come to court with the same attorney, the judge should conduct an inquiry to determine whether a conflict exists. *United States v. De Berry*, *supra*; *United States v. Carrigan*, *supra*; *People v. Gomberg*, 38 N.Y.2d 307, 379 N.Y.S.2d 769 (1975). At the hearing the defendant "should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views." *United States v. Carrigan*, *supra*, at 1055. Even if the court should find no evidence of conflict, a defendant, once informed of the perils of joint representation, may wish the undivided assistance of counsel and his request should be respected. *Glasser v. United States*, *supra*, 315 U.S. at 75-76. However, a defendant may elect to continue with the same lawyer, and the trial judge must then respect this decision unless a specific conflict appears. *Abraham v. United States*, 549 F2d 236, 239 (2nd Cir. 1977); but see, *United States v. Mari*, *supra* (concurring opinion) and *United States v. Carrigan*, *supra* (concurring opinion) If a proper inquiry has been conducted, ineffective assistance due to joint

representation cannot be shown unless the appellant can point to "some specific instance of prejudice, some real conflict of interest." *United States v. Lovano*, 420 F2d 769, 773 (2nd Cir. 1970) On the other hand, if the trial court has failed to conduct an inquiry, the burden of proof on the question of prejudice shifts to the government. *United States v. De Berry*, *supra*; *United States v. Carrigan*, *supra*. This circuit has not had occasion to decide whether its rule as to the shifting of the burden of proof should apply on habeas review of state criminal cases. It stands to reason that the rule should apply since the Sixth Amendment clearly imposes a duty on the part of a trial judge, whether state or federal, to conduct a conflict hearing and some kind of sanction must exist for non compliance.* But see, *Salomon v. La Vallee*, 76 Civ. 1640 (S.D.N.Y. 1976, Pollack, U.S.D.J., Appendix, Exhibit B)

A defendant is entitled to a new trial if a conflict is shown to have depreciated representation on his case in some measure; the rule as to constitutional harmless error is inapplicable. *Glasser v. United States*, *supra*, 315 U.S. at 76 ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of

*The New York State courts apparently have not ruled on the consequences of a failure to conduct a conflict hearing although one is required under *People v. Gomberg*, *supra*.

of prejudice arising from its denial.") This circuit takes the position that when a defendant's Sixth Amendment right has been abridged because of a conflict in dual representation, he does not forfeit a new trial because the government had a potent case against him. *United States v. Carrigan, supra* at 1057.

B. Colon's "Agent For Buyer" Defense Conflicted With Salomon's General Denial of Guilt. Instead of Defense, Salomon Got Prosecution From Mr. Fusco.

Mariano Salomon faced a prosecution that exposed him to a lifetime of incarceration and which in fact sent him away for a minimum of twenty years and to a maximum of life. At his trial, instead of a defense, he got prosecution from Mr. Fusco. The defense raised by Mr. Fusco for Colon all but explicitly conceded the guilt of Salomon. If Colon served the role of innocent intermediary between Officer Galasso and a supplier in a sale of cocaine scheduled for consummation at the Hunts Point Paint and Hardware Store, as contended by Mr. Fusco, where does this leave Salomon when he came knocking with the merchandise at the door of the Hunts Point store? Quite obviously Colon's defense conceded the consummation of the sale inside the store on November 8, 1973 and accentuated the proof that Salomon was the seller. Mr. Fusco must have looked ridiculous to the jurors, contending simultaneously the innocence of both clients. His obvious insincerity on behalf of Salomon at least, could not have been overlooked.

A defendant in a criminal case is entitled to zealous and independent advocacy. *Anders v. California*, 386 U.S. 738, 744, 18 L.Ed.2d 493, 498, 87 S.Ct. 1396, 1399-1400 (1967) ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae."); *United States v. Carrigan*, *supra*, at 1057. Canon 5 of the Code of Professional Responsibility requires a lawyer to represent a client "zealously within the bounds of the law." The commentary to the American Bar Association Standards Relating to the Prosecution Function and the Defense Function § 3.5 at 214 gives as an example of conflict the making by an attorney of a point on behalf of one client that serves to disparage or belittle another client. Like the lawyer in *United States v. De Berry*, *supra*, who examined a police officer for the purpose of excluding only one of two defendants she represented as having fit the description of the man who checked the suitcase containing marijuana, Mr. Fusco in the service of one client focused suspicion on another. It was therefore improper of Mr. Fusco, legally and ethically, to carry the day for the prosecution in its case against Salomon.

Judge Pollack fully acknowledged the incompatibility of Colon's defense with Salomon's general

denial when he first considered Salomon's writ. (Appendix, Exhibit B, p 3) Reasoning that the same clash would have existed had there been separate representation in a joint trial, he denied the writ anyway. This reasoning is deficient in three respects. First, independent counsel may have moved successfully pursuant to C.P.L. § 200.40 for a severance on the ground that Colon's defense would be antagonistic to Salomon's and obtained a separate trial. See, *People v. Krugman*, 44 Misc. 2d 48, 252 N.Y.S.2d 846 (1964). Second, even in a joint trial, at least it would not have been Salomon's own lawyer who helped defeat him. Third, a spirited advocate in a joint trial may have trampled on Colon's defense in order to benefit Salomon. It was, after all, Colon who did all of the negotiating and who went for the money, not Salomon. Had counsel argued that Salomon was Colon's courier* and not a principal seller, he may have gotten the jury's sympathy and an acquittal on the sale.** Such a partial victory would have at least precluded the more severe sentence that Salomon received over that of Colon.

*Independent counsel might have also made a claim to Salomon's entitlement to the "agent for buyer" defense on the theory that he operated as Colon's courier - Colon being a buyer's agent - and not the seller's. Such a claim, though highly tenuous, was dealt away by Mr. Fusco as a way to foreclose the introduction of Colon's prior narcotics dealings with Galasso. See appellant's brief at p 10-11.

**Virtually all jurors are aware of the Draconian penalties imposed in state narcotic cases and will often grasp on thin straws to save a defendant from the fate of a life sentence. Thus a defense attorney may be successful in obtaining a hung jury or even an acquittal of at least some counts by minimizing the role of a technically guilty client.

In his second memorandum, (Appendix, Exhibit D), Judge Pollack abandoned his original position that Colon's defense had worked to Salomon's detriment and instead found the respective defenses harmonious. Judge Pollack asserted that Mr. Fusco had actually raised the "innocent bystander" defense for Salomon. Therefore, since both defenses, "agent for buyer" and "innocent bystander" concede the sale, no repugnancy exists. Judge Pollack's finding that Mr. Fusco raised an "innocent bystander" defense for Salomon has no support in the trial record and is wrong. In reality, Mr. Fusco raised no defense at all for Salomon. In his summation, Mr. Fusco did not say that Salomon was an "innocent bystander" or a "knowing spectator." He never accused someone other than Salomon, such as the store employee, Antonio Jiminez, of being the seller. Mr. Fusco did not dispute Galasso's veracity or claim a frame. He did not introduce any evidence that Salomon was an "innocent bystander," conducted no cross examination that laid this claim out and requested no "innocent bystander" or "knowing spectator" charge and got none. In his summation Mr. Fusco merely commented about Galasso's testimony that after Salomon arrived with the merchandise he told Galasso that he had nothing to do with the deal.* [Tr. 623]

*"I have nothing to do with this deal. It's just [between] you and him." [Tr. 279]

It is submitted that Judge Pollack "discovered" the "innocent bystander" defense in order to avoid a duty unpleasant to him of issuing a writ of habeas corpus in a case where there was potent evidence of guilt. *United States v. Carrigan, supra*, teaches that a defendant does not forfeit his Sixth Amendment right to effective assistance because the government had a strong case against him.

C. Mariano Salomon Did Not Waive His Right to Challenge the Effectiveness of Counsel

In his first memorandum (Appendix, Exhibit B), Judge Pollack concluded at page 2:

... the trial judge apparently made no inquiry concerning the potential conflict in interest, and petitioner did not expressly waive his right to challenge the effectiveness of his counsel on that basis.

At the subsequent hearing on consideration of the question of waiver, not the slightest evidence was developed that could have altered this position. The official court minutes were reviewed and they establish that no inquiry into conflict had been conducted by the trial judge either before, during, or after the trial. Salomon testified that the question of conflict was not raised in any of his pre trial appearances. Fernando Fusco did not recollect any such inquiry either. Nor did his office file disclose one. Yet in his second opinion, Judge Pollack refused to resolve the question of waiver because of his position that no conflict existed.

There is no need to remand once more for a specific finding about waiver because it is obvious that Judge Pollack was correct the first time.

Salomon could not be deemed to have waived his Sixth Amendment right because he did not protest Mr. Fusco's representation of him on the ground of conflict of interest. A waiver of a constitutional right must be knowingly and intelligently made.

Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019. Judge Lumbard has gone on record that even if a defendant has been advised of the conflict problem "it would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant." *United States v. Carrigan, supra*. (concurring opinion at 1058) Even if there had been an allocution on conflict and an election by Salomon to proceed with Mr. Fusco, the law still gives Salomon the right to raise the question of effective assistance provided that he can show some specific instance of prejudice, or some real conflict of interest. *United States v. Lovano, supra*. As mentioned in appellant's brief at page 19, it is when no hearing has been conducted that the burden of proof on the question of prejudice shifts to the government. *United States v. DeBerry, supra*; *United States v. Carrigan, supra*. Inasmuch as the prejudice here is crystalline

clear, it does not matter which standard applies in a habeas review of a state case. (See appellant's brief, p 20)

CONCLUSION

For the reasons given above, the order of the United States District Court for the Southern District of New York on June 17, 1977, should be reversed and the case remanded to the District Judge with instructions to issue the writ of habeas corpus.

DATED: New York, New York
January 10, 1978.

Respectfully submitted,

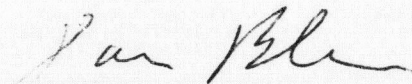
David Blackstone
401 Broadway
New York, New York 10013
Tel. 226-6684

Attorney for Petitioner-Appellant
Mariano Salomon

AFFIRMATION OF SERVICE

DAVID BLACKSTONE, a member of the Bar of the State of New York, hereby affirms to the following

On the 10th day of January, 1978, I caused a copy of the foregoing brief and appendix to be served upon the New York State Attorney General by depositing same in postage-paid wrappers, properly addressed in the United States Mail, and that at the time of such service I knew the address to be the correct address by prior papers and proceedings heretofore had herein.



DAVID BLACKSTONE



STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box
☐ Certification By Attorney
☐ Attorney's Affirmation

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box
☐ Individual Verification
☐ Corporate Verification

the the foregoing deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

Check Applicable Box
☐ Affidavit of Service By Mail
☐ Affidavit of Personal Service

On 19 deponent served the within attorney(s) for

in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On 19 at upon

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,
DAVID BLACKSTONE

Attorney for

Office and Post Office Address
401 Broadway
NEW YORK, NEW YORK 10013

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on 19

at M.

Dated,

Yours, etc.,
DAVID BLACKSTONE

Attorney for

Office and Post Office Address
401 Broadway
NEW YORK, NEW YORK 10013

To

Attorney(s) for

Index No. 77-2143

Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIANO SALOMON,

v.

Petitioner-Appellant,

J. EDWIN LA VALLEE, SUPERINTENDENT,
CLINTON CORRECTIONAL FACILITY,

Respondent-Appellee.

AFFIRMATION OF SERVICE

DAVID BLACKSTONE

Attorney for **MARIANO SALOMON**
Office and Post Office Address, Telephone

401 Broadway
NEW YORK, NEW YORK 10013
Tel. No. 226-6684

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for